STATE OF MICHIGAN
IN THE SUPREME COURT
(Appeal from the Michigan Court of Appeals)
(Judges Borello, Meter, and Stephens)

TARA HAMED,

Plaintiff-Appellee,

v

WAYNE COUNTY, THE WAYNE COUNTY SHERIFF'S DEPARTMENT, THE WAYNE COUNTY SHERIFF, SGT KENNETH DAWWISH, AND CPL NETTIE JACKSON,

Defendants- Appellants.
_____/

Supreme Court No. 139505

Court of Appeals No. 278017

Wayne Circuit Court No. 03-327525-NZ

AMICUS BRIEF OF ATTORNEY GENERAL BILL SCHUETTE ON BEHALF OF THE STATE OF MICHIGAN

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STATEMENT OF INTEREST OF AMICUS CURIAE ATTORNEY GENERAL BILL SCHUETTE

This case involves important questions regarding the interpretation and application of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. As the State's largest employer and provider of public services and accommodations, the State of Michigan and its many governmental agencies and directors are frequently the target of civil litigation brought pursuant to the ELCRA for money damages and attorney fees. This case is of particular note as it involves application of the ELCRA to a jail or prison-type setting, since the State operates numerous prison facilities throughout the State that house thousands of inmates, and receives just as many visitors. For these reasons, and those set forth more fully below, Amicus Curiae Attorney General Bill Schuette respectfully submits this brief in support of Defendants-Appellants.

QUESTIONS PRESENTED FOR REVIEW

In its June 23, 2010 order granting leave in this case, the Court limited the issues to whether:

> (1) defendants Wayne County and Wayne County Sheriff's Department may be held liable to the plaintiff for quid pro quo sexual harassment under MCL 37.2103(i);
>
> (2) the plaintiff's incarceration in the Wayne County Jail is a public service within the meaning of MCL 37.2301(b); and
>
> (3) the trial court erred in permitting the plaintiff to amend her complaint to allege violations of the Michigan Civil Rights Act.

The Attorney General will address the first two questions in this amicus brief.

INTRODUCTION

This case presents the opportunity for this Court to reexamine and overrule its decision in *Champion v Nationwide Security*. *Champion* was wrongly decided. Its strict liability rule is contrary to well-established agency principles, is not supported by the plain language of the Elliott-Larsen Civil Rights Act, and fails to accomplish the remedial goals of the Act.

If, however, this Court does not overrule *Champion*, this Court should hold that the Court of Appeals erred in this case by extending *Champion*'s strict liability standard for quid pro quo sexual harassment by a supervisor in the employment context to cases involving public accommodations and public services. Such an extension will have dramatic consequences for liability for the State and its agencies arising from the actions of its employees. Significantly, it will erode the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*, by which the Legislature has expressed its intent to broadly immunize governmental agencies from tort liability while engaged in the exercise or discharge of a governmental function, absent a clearly defined exception. The Legislature has never clearly expressed an intent to impose strict liability on governmental agencies for the criminal activities of their employees. Therefore, the *Champion* decision should not be extended from the employment setting, which is different in character from the provision of public services or public accommodations. And if extended to public services and public accommodations, the standards articulated in *Champion* must be subject to the same narrow parameters as established there.

Additionally, the Court of Appeals' extension of *Champion* is potentially not just a vertical decision that will substantially impact the body of law being developed in public accommodation/service quid pro quo cases. It is also a horizontal decision that will likely impact liability in the employment context and in all hostile work environment cases, continuing to erode both the obligations imposed on plaintiffs and the protections afforded the employer. The

State and its agencies should not be subject to strict liability for the ultra vires, criminal acts of its employees.

Regarding the second question, the ELCRA was never designed to apply to persons incarcerated in prison or in jail because the function of these facilities is not to provide public services or public accommodations to the public, but to punish felons and misdemeanants for their crimes and – for jails – to house pretrial detainees. The strict application of the statutory language of the ELCRA does not apply to cases of prisoners because the facilities themselves are excluded. This is true not only for the definition of "public accommodation" and "public service," but also for the exception to the ELCRA. The jails and prisons are not places that are "open to the public" and for this second reason the facilities do not fall within the purview of the ELCRA. Regarding the 1999 amendment to the ELCRA to exclude prisoners who were serving a "sentence of imprisonment," plaintiff argues that this amendment is unconstitutional. See Plaintiff's brief, pp 43-46. This is wrong. The Legislature reasonably determined that prisoners under sentence are differently situated from other citizens, and generally do not receive public services or public accommodations during their term of incarceration.

Because the second question is a threshold issue for this case, the Attorney General will brief the question whether a jail is a "public service" under the Act as the first issue.

STATEMENT OF PROCEEDINGS AND FACTS

The Attorney General adopts the statement of proceedings and facts as provided by the Defendants-Appellants.

ARGUMENTS

I. The Elliott-Larsen Civil Rights Act prohibits discrimination based on sex, among other classifications, at places of public accommodation or public service. A place of public service offers services to the public. Because the jail does not offer services to the public, it is not governed by the ELCRA.

A. Standard of Review

The proper construction of a statute is a question of law, and this Court reviews the statutory interpretation of the Court of Appeals *de novo*.[1]

B. Analysis

The ELCRA was never intended to apply to prisoners in jail settings. This is true for two reasons.

First, jails do not render services to the public. This fact is demonstrated by an examination of the plain text of the statute. A jail is not a public accommodation because it does not offer goods, services, facilities, privileges, advantages, or accommodations to the public. Similarly, jails do not provide services to the public. Rather, the primary function of jails is to punish felons and misdemeanants and to incarcerate arrestees and other pretrial detainees.

Second, jails are also "not open to the public" and fall within the exclusion that the ELCRA provides. The ELCRA specifically exempts "establishment[s] not in fact open to the public." A jail is a place that is not open to the public. Thus, the exception also applies.

Finally, contrary to plaintiff's argument in her brief, pp 43-46, the amendment to the ELCRA excluding prisoners within the prison or jail was not unconstitutional.

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[1] *Apsey v Mem'l Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).

1. **The plain language supports the conclusion that the ELCRA does not apply to prisoners in the jail setting because jails are not a public service.**

a. The Act prohibits discrimination against individuals in certain places.

The ELCRA, MCL 37.2101 *et seq.*, was designed to prohibit discrimination on the basis of religion, race, color, national origin, age, sex, height, or marital status in places of public accommodation or public service. The prefatory language to the Act outlines its purposes:

> AN ACT to define civil rights; to prohibit discriminatory practices, policies, and customs in the exercise of those rights based upon religion, race, color, national origin, age, sex, height, weight, familial status, or marital status; to preserve the confidentiality of records regarding arrest, detention, or other disposition in which a conviction does not result; to prescribe the powers and duties of the civil rights commission and the department of civil rights; to provide remedies and penalties; to provide for fees; and to repeal certain acts and parts of acts.

Under MCL 37.2102, Article I of the Act provides that the opportunity to use public accommodations, public service, and educational facilities without discrimination is a civil right:

> (1) The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.[2]

The Act in Article III under MCL 37.2302(a) creates the operative language for prohibiting discrimination in places of public accommodations and public services:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations *of a place of public accommodation or public service* because of religion, race, color, national origin, age, sex, or marital status. [Emphasis added.]

Significantly, it protects individuals, but only in certain, identified places. In determining the scope of the ELCRA's application in Article III, the key words are "of a place of public

[2] MCL 37.2102.

accommodation or public service." The ELCRA is inapplicable to places that do not offer public accommodations or public services.

b. A jail is not a place of public accommodation.

Consistent with the question whether a jail is a public service, the analysis that demonstrates that a jail is not a place of public accommodation is instructive in examining the first question posed by this Court. "Public accommodation" is defined earlier in Article III as follows:

> (a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. Place of public accommodation also includes the facilities of the following private clubs[.][3]

In examining the breadth of the change to Michigan law in adopting this statute, this Court also noted that the statute expanded the right to equality in new previously uncovered areas by expanding the coverage of civil rights to nongovernmental handling of public accommodations.[4]

This Court, in *Haynes v Neshewat*, explained the breadth of the application of the ELCRA, noting that it protects the rights of individuals, and is not limited to members of the public.[5] That is correct. There is nothing in the protection provided by the Act itself that requires that the goods and services of the public accommodation or public service be offered to the individual, but only that the individual be subject to the discriminatory act in a *place of public accommodation* or *public service*.[6]

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[3] MCL 37.2301.
[4] *Michigan Department of Civil Rights, Ex Rel, Rocky Forton v Waterford Township Department of Parks and Recreation*, 425 Mich 173, 186; 387 NW2d 821 (1986).
[5] *Haynes v Neshewat*, 477 Mich 29, 38; 729 NW2d 488 (2007).
[6] *Haynes*, 477 Mich at 38 (emphasis added).

The *Haynes* case was addressing whether Oakwood Hospital was a place of public accommodation. As noted by *Haynes*, the ELCRA requires as a threshold matter that the place covered by the statute in fact offer a public accommodation to the public under MCL 37.2301(a) in order for an individual to be protected:

> Oakwood provides a full range of health services to the public. It is a "business [or] . . . health . . . facility . . . whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public." MCL 37.2301(a). Therefore, Oakwood qualifies as a place of public accommodation. See *Whitman v Mercy-Memorial Hosp*, 128 Mich App 155; 339 NW2d 730 (1983). As a result, all four elements of the statute are sufficiently established and plaintiff has stated a cause of action under the CRA.

Oakwood Hospital is a public accommodation because it offers a "full range of health services to the public." Once covered, it does not matter whether the individual who brings the claim of discrimination was offered goods, services, facilities, privileges, advantages, or accommodation. The Court in *Haynes* elaborated on this point:

> Defendants argue, and the Court of Appeals majority agreed, that plaintiff states a claim under § 302(a) only if he alleges that he was deprived of goods, services, facilities, privileges, advantages, or accommodations that were made available to the public. According to defendants, even if there has been an interference with plaintiff's ability to practice as a physician at Oakwood, plaintiff has not stated a cause of action. They reason that the practice of medicine is not a privilege offered to the public. We reject this interpretation because it is contrary to the language of the statute.
>
> * * *
>
> MCL 37.2302(a) protects the rights of individuals. Individuals, not members of the public, are protected from the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations. Nowhere within the wording of § 302(a) is it required that the goods, services, facilities, privileges, advantages, or accommodations be offered to the public. We will not read into the statute a limitation that is not there. We hold that MCL 37.2302(a) forbids unlawful discrimination against any individual in a place of public accommodation, not just against members of the public.[7]

[7] *Haynes*, 477 Mich at 37.

In this way, a place that offers public accommodations to the public is subject to the ELCRA, and the protections extend to all individuals within that place regardless whether they are members of the public.

Consistent with this understanding, a jail is not a place of public accommodation because it does not offer public accommodations to the public.

This is so because county jails by statute were established to incarcerate felons and misdemeanants.[8] These jails may also house persons charged with crimes as pretrial detainees,[9] as well as to those persons arrested but not charged with crimes.[10] But prisoners – as incarcerated persons – are not members of the public. Thus, any accommodations or privileges that they receive are not relevant for the definition of "public accommodation" because it is limited to accommodations "made available to the public."

This Court's analysis in *Brown v Genesee County Board of Commissioners* reaching the conclusion that prisoners are not members of the "public" under the governmental immunity statute confirms this understanding.[11] The language at issue in *Brown* was MCL 691.1406, the public-building exception to governmental immunity, which provides that governmental agencies have the obligation to repair and maintain public buildings under their control when "*open for use by members of the public.*" The language here is similar. The gravamen of the Court's analysis in *Brown* is that prisoners are not invitees:

> *Jail inmates are not members of the public for purposes of the public building exception.* Unlike a person who enters a jail, e.g., to meet with an inmate, make a delivery, or apply for a job, an inmate does not visit a jail as a potential invitee. Instead, inmates are legally compelled to be there. Inmates thus are not within the

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[8] MCL 800.1 *et seq.*
[9] MCR 6.106(B).
[10] See *People v Walker*, 142 Mich App 523, 527-528; 370 NW2d 394 (1985).
[11] *Brown v Genesee County Board of Commissioners*, 464 Mich 430, 436 n 4, 447; 628 NW2d 471 (2001)(Corrigan,C.J., plurality opinion; Markman, J., concurring).

class of persons the Legislature intended to protect from defects in public buildings.[12]

The same is true here. Jail inmates are not members of the public for purposes of evaluating whether a jail facility offers goods or services to the public.

Thus, the jails that provide services and privileges to prisoners are not public accommodations because they do not offer these services to members of the public.

Other States have examined this same question whether a correctional facility is a "public accommodation" under their respective civil rights statutes and have reached conflicting conclusions.[13]

c. A jail is also not a place of public service.

In the definitions of Article III, public service is defined as follows:

> (b) "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment.[14]

An analysis of the language of the statute discloses that there are three components to the definition:

(1) "a public facility, department, agency, board, or commission" that is

(2) "owned, operated, or managed by or on behalf of"

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[12] *Brown*, 464 Mich at 439.

[13] *Skaff v West Virginia Human Rights Commission*, 191 W Va 161, 163-164; 444 SE2d 39 (1994)("the inmates' place of confinement cannot be deemed a public accommodation," where evaluating a similar definition of "public accommodation"); *Blizzard v Floyd*, 149 Pa Commw 503; 613 A2d 619, 620, 621 (1992)(" It is therefore clear that a state correctional institution is not a public accommodation as defined by the Act," where evaluating similar definition of "public accommodation"). But see *Dep't of Corrections v Human Rights Commission*, 181 Vt 225; 917 A2d 451, 459-460 (2006). The dissent to this opinion more closely follows Michigan's scheme of statutory interpretation. See *Human Rights Commission*, 917 A2d at 461-462, 463 (Burress, J., dissenting)("The statute as written does not apply to state correctional facilities").

[14] MCL 37.2301(b).

(3) (i) "the state," or

(ii) "a political subdivision," or

(iii) "an agency thereof" or

(iv) "a tax exempt private agency *established to provide service to the public*[.]" [Emphasis added.]

The critical language of this definition is "established to provide service to the public." The issue is whether this clause only modifies "tax exempt private agency" or whether it also modifies the other three items listed, (i) "state" and (ii) "political subdivision" and (iii) "an agency thereof."

The Court of Appeals has twice reviewed this clause, once in this statute in *Neal v Department of Corrections (Neal II)*,[15] and another time in the Persons with Disabilities Civil Rights Act (formerly known as the Handicappers' Civil Rights Act) in *Doe v Department of Corrections (Doe II)*.[16] In each, the courts relied on the Last Antecedent Rule to determine that the clause only modified "tax exempt private agency." This rule provides that a modifying clause is confined solely to the last antecedent, unless the modifying clause is set off by a punctuation mark, such as a comma or a period.[17]

In *Neal II*, the Court of Appeals implicitly relied on this point:

> Under subsection 301(b), a "public service" includes "a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state...." The MDOC is a state agency, and this state's correctional facilities are operated by it.

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[15] *Neal, et al v MDOC (On Rehearing) (Neal II)*, 232 Mich App 730; 592 NW2d 370 (1998).
[16] *Doe v MDOC (Doe II)*, 240 Mich App 199; 611 NW2d 1 (2000), adopting Judge White's concurrence in *Doe v MDOC (Doe I)*, 236 Mich App 801; 601 NW2d 696 (1999).
[17] *People v Small*, 467 Mich 259, 263 n 4; 650 NW2d 328 (2002), citing 2A Singer, Sutherland on Statutory Construction (6th Ed), § 47.33, pp 369, 373.

> Thus, under the plain language of subsection 301(b), the MDOC clearly falls within the broad statutory definition of a "public service."[18]

Likewise in *Doe II*, the Court of Appeals adopted the reasoning of Judge White from *Doe I*, who expressly relied on this rule of statutory construction:

> The absence of a comma after "private agency" in both the PWDCRA's and CRA's definitions of "public service" supports that the phrase "established to provide service to the public" modifies only "a tax exempt private agency." See Eskridge & Frickey, Cases and Materials on Legislation, ch 7, § 2, p 644 (noting that "'evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma,'" quoting 2A Sutherland Statutory Construction (4th Ed), § 47.33, p 245.) "Qualifying words and phrases in a statute refer solely to the last antecedent in which no contrary intention appears." [Citation omitted.] In this instance, the modifying clause ("established to provide service to the public") is confined to the last antecedent ("a tax exempt private agency"). Nothing in the subject matter or dominant purpose of the statute requires a different interpretation.

But this Court clarified the Last Antecedent Rule in *Cameron v Auto Club Insurance* that the rule "does not apply if something in the statute's subject matter or dominant purpose requires a different interpretation."[19]

That is the situation here. The subject matter of the ELCRA in Article III is to protect individuals from discrimination in places of public accommodation or public service. The design of these two categories is to include private establishments that offer accommodations to the general public ("public accommodation") and to include public entities that provide services to

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[18] *Neal II*, 232 Mich App at 736-737 (citation omitted). The Court of Appeals had cited to the United States Supreme Court's analysis in *Pennsylvania Dep't of Corrections v Yeskey*, 524 US 206; 118 S Ct 1952; 141 L Ed 2d 215 (1998) in support of its decision, but this case is distinguishable because the statute reviewed there, American Disabilities Act, did not have the limiting language of "established to provide service to the public." See Judge O'Connell's dissent, *Neal II*, 232 Mich App at 745-746.

[19] *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 70; 718 NW2d 784 (2006), overruled on other grounds, *Regents of the University of Michigan v Titan Insurance Co*, 487 Mich. 289, 293; ___ NW2d ___ (2010).

the public.[20] The application of the Last Antecedent Rule here to limit "established to provide service to the public" as only modifying "tax exempt private agency" creates the discordant result that a "public facility" is a public service even if it provides no service to the public. Such a construction would contradict the statute's subject matter and its dominant purpose. Consequently, the Last Antecedent Rule should not be applied here.

Moreover, the application of the Last Antecedent Rule here would also ignore the exception to the application of Article III in MCL 37.2303, which exempts places of public accommodation and public service that are not "open to the public." See sub-argument (2) below. As a matter of common sense, a public facility that does not provide service to the public will also not be open to the public. There would be no reason to include public facilities in the definition of a public service in MCL 37.2301– even though they do not provide services to the public – only to exclude them in exception because the facility is not open to the public in MCL 37.2303. The construction that applies the clause "established to provide service to the public" to "state" and "political subdivision" as well as to "an agency thereof" accords with the exception, and thus with the scheme of the statute.

As already noted earlier, a jail does not provide a service to the public because inmates are not members of the public. Therefore, a jail is not a public service.

2. The jails are also exempted from the ELCRA under the exception that excludes "establishments not in fact open to the public."

The Legislature provided the same exception to the application of the Act for both public accommodations and public service:

> This article shall not apply to a private club, *or other establishment not in fact open to the public*, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the private club or establishment

[20] See *Forton*, 425 Mich at 186.

> are made available to the customers or patrons of another establishment that is a place of public accommodation or is licensed by the state[.][21]

The key phrase here is "establishment not in fact open to the public."

The language of the exception is unambiguous. The purpose in interpreting statutes is to give effect to the intent of the Legislature.[22] This Court reviews the language of the statute itself and gives the statute's words their common and ordinary meaning. Where the statutory language is unambiguous, this Court presumes that the Legislature intended the meaning it clearly expressed and further construction is neither required nor permitted.[23] The language at issue here is ordinary. There can be no dispute that the exception applies equally to public accommodations and public service, which is defined as including public facilities, departments, and agencies. The plain meaning of this exception is clear – that places that are not open to the public are not governed by the ELCRA.[24]

The word "open" in this sentence for public accommodations or public service indicates that these places of public accommodation or public service make themselves available to members of the public at large for the activities that the Act protects in MCL 37.2302(a): "goods, services, facilities, privileges, advantages, or accommodations." In this fashion, the public facilities are then placed in the same position as privately-owned places of accommodation. If they open themselves to the public, they must comport with the Act and cannot discriminate against protected class members. For example, the branch offices of the Department of Secretary of State, in providing services to the public, must comply with this Act

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[21] MCL 37.2303 (emphasis added).
[22] *Moore v Secura Ins*, 482 Mich 507, 517; 759 NW2d 833 (2008).
[23] *Moore*, 482 Mich at 517.
[24] The fact that there are areas in jail facilities that are open to the public cannot be disputed. The allegations of misconduct, however, did not occur in the areas open to the public.

in the same way that a local grocery store must comply with this Act. But these protections do not apply to private clubs and to establishments not "open" to the public.

The proper understanding of the word "public" also supports this point. As used here, the word "public" is a noun, and not an adjective. The first definition of "public" in the *Merriam Online Dictionary* provides that it means "a place accessible or visible to the public." Likewise, the *Random House Webster's College Dictionary* (2001), p 1070, provides in one of its definitions: "in a situation open to public notice, view, or access." That is the concept here. A public service or public accommodation that holds itself open to public access must ensure that it does not discriminate based on sex. But a jail facility is not open to the public.

As already argued, prisoners are not members of the "public" – and this is true when examining the exception to public accommodations and public service. The concept underlying this exception is to limit the application of the ELCRA to places that open themselves to the public – drawing in others as invitees. The analysis of *Brown* bears repeating that "jail inmates are not members of the public" when evaluating the public building exception under MCL 691.1406 because they are not social invitees.[25] This Court concluded that inmates are "not within the class of persons the Legislature intended to protect from defects in public buildings."[26] The same is true here. The plaintiff was not an invitee, but rather was compelled to be in the jail based on outstanding warrants. Like *Brown*, she was not a member of the public for purposes of examining the exception to the Act.

There have been no cases of this Court that have applied the ELCRA or its exception to prisoners within a jail or prison setting. The only published decision on this issue was *Neal II* from the Court of Appeals, and that decision was erroneous.

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[25] *Brown*, 464 Mich at 439.
[26] *Brown*, 464 Mich at 439.

The Court of Appeals in *Neal* erred when it determined that prisoners are members of the public, relying in part on *Green v Department of Corrections*,[27] which this Court overruled in *Brown*.[28] In evaluating the exception, the Court in *Neal* determined that inmates were members of the public and therefore that the exception was not applicable because the correctional facilities were "open" to the prisoners. The Court of Appeals specifically relied on *Green* in reaching this conclusion:

> "[R]esident inmates are obviously members of the public in a general sense." *Martin v Dep't of Corrections*, 424 Mich 553, 565 [] (1986) (Cavanagh, J., dissenting). Our Supreme Court has held that prisoners are members of the public for purposes of the governmental tort liability act, MCL 691.1401 *et seq.*[]. *Green v Dep't of Corrections*, 386 Mich 459, 464 [] (1971). The Supreme Court has also held that prisoners are members of the public for purposes of the Administrative Procedures Act, MCL 24.201 *et seq.*[]. *Martin*, *supra*, p 555. Civil rights acts are to be liberally construed to provide the broadest possible remedy. *Reed*, *supra*.[29]

But this Court has clarified the point that prisoners are not members of the public in *Brown* in examining the word in a very similar phrase. *Brown* has undermined the validity of the analysis of the Court of Appeals in *Neal II* on this point.

Moreover, the analysis in *Neal II* also disclosed the recognition that the plain language did not support its conclusion. The Court of Appeals referred to the "literal" sense of the language of the statute:

> Only by reading "private club, or other establishment not in fact open to the public" in its most restrictive, *literal sense*, may a correctional facility be deemed to be "not open to the public."[30]

The literal sense, of course, is just another way of stating its plain meaning – this analysis is a concession that in ordinary terms, prisons are not open to the public. The same is true for jails.

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[27] *Green v Dep't of Corrections*, 386 Mich 459; 192 NW2d 491 (1971).
[28] *Brown*, 464 Mich at 436 n 4.
[29] *Neal II*, 232 Mich App at 737-738.
[30] *Neal II*, 232 Mich App at 737-738 (emphasis added).

As a second basis, the Court of Appeals in *Neal II* rejected the application of the exception in § 303 based on its conclusion that the departments are subject to the Act even if the structures in which they are housed are not "open" to the public:

> *The fact that the MDOC operates buildings that are not fully open to the public* does not mean that the MDOC itself is a "private club or other establishment" not open to the public. There is a distinction between a state agency and the buildings that house that state agency. There are presumably many departments of state government (this Court included) that operate facilities that members of the public may not enter at their will. This, however, does not mean that those departments themselves are private establishments not open to the public; *it merely means that the physical structures used by those departments are not fully accessible to the public.*[31]

But this analysis fails to acknowledge that the provision of "goods, services, facilities, advantages, or accommodations" all occur under § 302(a) at "*a place.*" In other words, the issue is just that – whether the place for the public accommodation or public service is open to the public. The jail here does not invite the public to its facility. Rather, it serves the public by safely incarcerating convicted felons, misdemeanants, and holding pretrial detainees. It is not open to the public. There is no claim that the sexual abuse occurred here in areas in which members of the public could come and visit the incarcerated prisoners.

Finally, in the enacting language of 1999 PA 202, the Legislature specifically noted that the *Neal II* decision was a "misinterpretation" of the statute, and that the "original intent" of the Act was that it not apply to a state or county correctional facility:

> Enacting section 1. This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision *Neal v Department of Corrections* , 232 Mich App 730 (1998). This legislation further expresses the *original intent of the legislature* that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act.[32]

This action confirms that the *Neal II* decision was wrongly decided.

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[31] *Neal II*, 232 Mich App at 737 (emphasis added).
[32] 1999 PA 202 (emphasis added).

The only other decision in Michigan to identify this issue was the Court of Appeals in *Bazzetta v Department of Corrections Director.*[33] The Court of Appeals there elected not to address the claim: "It is unnecessary to determine whether the DOC is exempt from the CRA under § 303."[34] The Court of Appeals did note, however, that the trial court there had concluded that "Plaintiffs failed to state a claim for relief because Defendants were exempt from article three of the CRA under § 303, MCL 37.2303."[35] That is the same point the Attorney General is advancing here.

In brief, the Legislature never intended the ELCRA to apply to prisoners in the jail setting. Rather, the remedies available to prisoners who are housed in jails are found in actions brought under 42 USC 1983 alleging federal constitutional violations, or state-based constitutional challenges – including Equal Protection Clause challenges – or other actions based in tort or gross negligence. If the Legislature had intended to draw prisoners into the ambit of the Act, it would have provided for the standards of protection that were specific to the jail setting. In a similar vein, the federal courts have generally determined that Title VII does not apply to prisoners housed in correctional facilities.[36]

Thus, prisoners are differently situated in their relationship to a jail facility than are private citizens who voluntarily seek the patronage of a public service like the Secretary of State's office or a private business that provides a public accommodation. The standards in § 103 were never intended to apply to prisoners or jail inmates in this setting. This is one of the reasons that the Legislature exempted places like the Wayne County jail, which are not open to the public.

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[33] *Bazzetta v Department of Corrections Director*, 231 Mich App 83; 585 NW2d 758 (1998).
[34] *Bazzetta*, 231 Mich App at 91.
[35] *Bazzetta*, 231 Mich App at 90.
[36] See, e.g., *Williams v Meese*, 926 F2d 994, 997 (CA 10, 1991)("Neither Title VII nor the ADEA provides plaintiff any substantive rights because he does not have an employment relationship with the Federal Bureau of Prisons or any of the defendants"). See also *Beil v Lake Erie Correction Records Department*, 282 Fed Appx 363, 365 n 1 (CA 6, 2008).

3. The Legislature's amendment to the ELCRA, clarifying that the Act does not provide a cause of action for prison inmates, does not offend the Equal Protection Clause of the Michigan Constitution because the amendment is rationally related to a legitimate governmental purpose.

Although not specifically addressed below, the constitutionality of the amendment *is* implicitly at issue here as Plaintiff Hamed acknowledges. (Plaintiff's Brief, pp 43-46). Under established equal protection principles, Public Act 202 is subject to review under the rational basis test, which simply requires that the legislation be rationally related to a legitimate governmental interest. Here, the Legislature has a legitimate governmental interest in deterring frivolous claims by prison inmates. Despite this legitimate interest, a federal district court ruled that the Legislature's amendment failed rational basis review, and therefore violated the Michigan Constitution. While not binding on the state courts, this decision clouds the constitutionality of the Legislature's amendment, and invites potential abuse by future plaintiffs.

Thus, this Court should clarify that the Legislature's amendment of the ELCRA is constitutional, removing the shadow cast by the federal's court's erroneous decision.[37]

a. Public Act 202 is subject to rational basis review.

The Equal Protection Clause of the Michigan Constitution provides that "[n]o person shall be denied the equal protection of the laws . . . ."[38] This Court has interpreted this clause to be coextensive with its federal counterpart.[39] Thus, the federal and Michigan Equal Protection Clauses both require that persons under similar circumstances be treated alike, but do not

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[37] Courts may overlook preservation requirements if the issue involves a question of law and the facts necessary for its resolution have been presented. *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998); *Steward v Panek*, 251 Mich App 546, 555; 652 NW2d 232 (2002).

[38] Const 1963, art 1, § 2. For a discussion of the interplay between article 1, § 2 and the ELCRA, see *Sharp v City of Lansing*, 464 Mich 792, 800; 629 NW2d 873 (2001) and *Lewis v Michigan*, 464 Mich 781, 788-789; 629 NW2d 868 (2001).

[39] *Harvey v State*, 469 Mich 1, 6; 664 NW2d 767 (2003), citing *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000); *Vargo v Sauer*, 457 Mich 49, 60; 576 NW2d 656 (1998); *Doe v Dep't of Social Services*, 439 Mich 650, 662; 487 NW2d 166 (1992).

demand consistent treatment of persons under different circumstances.[40] Unless the legislation at issue impedes a fundamental right or creates a classification based on "suspect" factors, or factors such as gender or illegitimacy, it is reviewed under a rational basis standard."[41] Generally, challenges to the constitutionality of social or economic legislation on equal protection grounds are examined under the rational basis test.[42]

Prisoners are not a suspect class; conviction of a crime justifies the imposition of many burdens.[43] Thus, rational basis review applies to the Legislature's amendment of the ELCRA. Under rational basis review, "'the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption.'"[44] "To prevail under this highly deferential standard of review, a challenger must show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute."[45] "A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable."[46] "'Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity

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[40] *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).
[41] *People v Idziak*, 484 Mich 549, 570; _773 NW2d 616 (2009), citing *Harvey*, 469 Mich at 7-8.
[42] *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004) (equal protection); *Downriver Plaza Group v City of Southgate*, 444 Mich 656, 666; 513 NW2d 807 (1994) (due process).
[43] See, e.g., *Conn Dep't of Pub Safety v Doe*, 538 US 1; 123 S Ct 1160; 155 L Ed 2d 98 (2003) (public identification as a felon); *Hudson v United States*, 522 US 93; 139 L Ed 2d 450; 118 S Ct 488 (1997)(occupational debarment); *Jackson v Jamrog*, 411 F3d 615, 621 (CA 6, 2005); *Harbin-Bey v Rutter*, 420 F3d 571, 576 (CA 6, 2005); *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 470; 639 NW2d 332 (2001); *People v Krajenka*, 188 Mich App 661, 663; 470 NW2d 403 (1990).
[44] *Harvey*, 469 Mich at 7 (citation omitted).
[45] *Harvey*, 469 Mich at 7 (quotation marks and citations omitted).
[46] *Harvey*, 469 Mich at 8.

when put into practice.'"[47] Indeed, a classification that has a rational basis is not invalid because it results in some inequity or it appears to be undesirable, unfair, or unjust.[48]

b. The decision in Mason v Granholm *is erroneous.*

In 2005, a group of female inmates filed a complaint in federal court asserting injuries based on alleged sexual harassment or abuse by male MDOC employees. Among other remedies, the plaintiffs sought a declaratory ruling that the March 10, 2000 amendment to the ELCRA is unconstitutional in that it violates the Equal Protection Clause of the federal Constitution.

Subsequently, on cross motions for summary judgment, the federal district court concluded that the Michigan Legislature's amendment of the ELCRA violated the plaintiffs' equal protection rights, and was unconstitutional.[49] The district court, relying on the U.S. Supreme Court's decision in *Romer v Evans*,[50] determined that the ELCRA amendment foreclosed prisoners' rights to the basic protection from discrimination guaranteed by Michigan's Equal Protection Clause, as implemented by the Legislature through the ELCRA, to all other persons.[51] The court acknowledged that the State had a legitimate interest in deterring frivolous lawsuits by prisoners, and protecting the public fisc, but that the ELCRA amendment was too broad to be rationally related to these interests.[52] Accordingly, the district court concluded that the amendment violated prisoners' equal protection rights under the Michigan Constitution, and was unconstitutional.

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[47] *Harvey*, 469 Mich at 7 (citation omitted).
[48] *Crego*, 463 Mich at 259-260.
[49] See *Mason v Granholm*, 2007 US Dist Lexis 4579 (January 23, 2007).
[50] *Romer v Evans*, 517 US 620, 633; 116 S Ct 1620; 134 L Ed 2d 855 (1996).
[51] *Mason*, 2007 US Dist Lexis 4579 at *6-13.
[52] *Mason*, 2007 US Dist Lexis 4579 at *12-13.

Again, while the decision by the district court in *Mason* is not binding on the state courts,[53] its existence raises doubt about the constitutionality of the Legislature's amendment, and suggests to potential plaintiffs that they may evade the plain language of the ELCRA by filing in federal court, as opposed to pursuing any state-law ELCRA claims in state court, thereby raising the specter of polar-opposite decisions by state and federal courts.

c. Public Act 202 is constitutional because it is rationally related to a legitimate governmental interest.

Under the rationale basis test, a statute qualifies as constitutional if its classification scheme rationally relates to a legitimate governmental purpose. Here, the amendment to the ELCRA classifies between free persons, and persons serving a sentence of imprisonment, but this classification is supported by a legitimate governmental purpose, and is therefore constitutional.

Both the Michigan courts and the federal courts have recognized that a State has a legitimate governmental interest in deterring frivolous actions and requests by prisoners, and in conserving the scarce resources that are involved in responding to such actions.

For example, in *Proctor v White Lake Twp Police Dep't*, the Court of Appeals concluded that legislation barring any person serving a sentence in a state or federal correctional facility from requesting records under the Freedom of Information Act, MCL 15.231 *et seq.*, did not violate the Equal Protection Clause because the statute was rationally related to the State's interest in deterring frivolous FOIA requests by prisoners:

> We find that the Legislature's FOIA exclusions singling out incarcerated prisoners rationally relate to the Legislature's legitimate interest in conserving the scarce

[53] See *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). The *Mason* decision is similarly not binding on other federal district courts. See *United States v Flores*, 477 F3d 431, 438 (CA 6, 2007); *Michigan Elec Employees Pension Fund v Encompass Elec & Data, Inc*, 556 F Supp 2d 746, 761-62 (WD Mich 2008).

> governmental resources squandered responding to frivolous FOIA requests by incarcerated prisoners.
>
> Moreover, the FOIA prisoner exclusions do not treat similarly situated prisoners differently. Incarcerated prisoners are differently situated than convicted criminals who are not incarcerated. The available legislative history behind the prisoner exclusions notes that most FOIA requests by criminals "are made by prisoners under the DOC's jurisdiction." Even assuming that the FOIA prisoner exclusions result in some unfairness to the extent that they permit some convicted felons to invoke the FOIA while others like plaintiff cannot, "a classification that has a rational basis is not invalid because it results in some inequity."[54]

Thus, the Court found the statute constitutional. A similar result occurred in *Morales v Michigan Parole Bd*, where the Court of Appeals concluded that a statute eliminating appeals by inmates from denials of parole was constitutional because, like *Proctor*, it was rationally related to the State's interest in deterring frivolous requests by prisoners, and conserving public resources.[55]

The Sixth Circuit Court of Appeals has also upheld the constitutionality of a Michigan statute that classifies between prisoners and non-prisoners. In *Jackson v Jamrog*, the Sixth Circuit, like *Morales* concluded that a statute that permits an appeal to state court by prosecutors and crime victims from decisions of the state parole board granting parole, but no equal right of appeal by a prisoner who is denied parole, does not violate equal protection rights under the federal Constitution.[56] The Sixth Circuit agreed that the State had demonstrated a rational basis for the distinction between prisoners and prosecutors and victims, based on the "perceived need to decrease frivolous inmate appeals from parole decisions, which had risen in number dramatically."[57] The Sixth Circuit noted prior opinions confirming that "deterrence of frivolous

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[54] *Proctor*, 248 Mich App at 470.
[55] *Morales v Michigan Parole Bd*, 260 Mich App 29, 33; 676 MW2d 221 (2003).
[56] *Jackson*, 411 F3d at 615.
[57] *Jackson*, 411 F3d at 619-620.

prisoner lawsuits" is a "legitimate legislative goal."[58] Accordingly, the Sixth Circuit affirmed the district court's decision that the statute was constitutional, and denied the prisoner's request for a writ of habeas corpus.

The same rationale may be applied to the Legislature's amendment of the ELCRA clarifying that it does not apply to persons serving a sentence of imprisonment. The amendment is supported by the legitimate legislative goal of deterring frivolous lawsuits by prisoners, and otherwise conserving the scarce public resources it takes to process and respond to such actions. The amendment further protects against windfall awards, and reduces the potential for judicial intervention in prison management. Furthermore, contrary to the federal district court's opinion, the amendment is rationally related to these purposes. The amendment merely precludes prisoners from utilizing a particular cause of action – an ELCRA claim – to challenge discriminatory conduct on the part of state actors.

This is a reasonable construction. Indeed, the idea that prisoners or detainees may pursue quid pro quo or possibly hostile environment sexual harassment cases from within the prison or jail setting is troubling. Not only is such a result contrary to the language of the ELCRA as enacted and amended, but it would be difficult, if not impossible, to apply the traditional analysis in such cases where prisons and jails are, by their very nature, hostile environments.

As noted by the Court of Appeals in *Neal I*, other causes of action remain available to prisoners to challenge allegedly discriminatory conduct. For example, prisoners can bring 42 USC 1983 actions alleging violations of the federal Constitution, and may also bring "a *Bivens*-type[59] action, arising directly under the United States Constitution."[60] Similarly, prisoner

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[58] *Jackson*, 411 F3d at 619-620, citing *Hampton v Hobbs*, 106 F3d 1281, 1287 (CA 6, 1997), and *Lewis v Sullivan*, 279 F3d 526, 528, 531 (CA 7, 2002).

[59] *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971).

plaintiffs may bring claims based on gross negligence or intentional tort theories, and seek monetary damages for the same. Finally, prisoners may challenge discriminatory conduct directly under the Michigan Equal Protection Clause by seeking declaratory and injunctive relief.[61]

Thus, prisoners clearly still have access to the courts through a number of avenues to challenge allegedly unconstitutional discriminatory conduct. The amendment simply eliminates one particular cause of action. The Legislature acted within its purview when it chose to preclude this avenue of relief, and Public Act 202 is therefore constitutional.

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[60] *Neal II*, 232 Mich App at 211, citing *Carlson v Green*, 446 US 14, 19-20; 100 S Ct 1468; 64 L Ed 2d 15 (1980). See, also, *Smith v Dep't of Public Health*, 428 Mich 540, 618-619; 410 NW2d 749 (1987) (Brickley, J.), aff'd sub nom *Will v Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989).

[61] See *Sharp*, 464 Mich at 800 and *Lewis*, 464 Mich at 788-789, recognizing that where a claim may not be properly brought under the ELCRA, a traditional challenge brought to enforce rights under the Equal Protection Clause may be had.

II. *Champion v Nationwide Security, Inc.* was wrongly decided and should be overruled. If not overruled, it should not be extended to quid pro quo sexual harassment actions involving public accommodations or public services because its strict liability rule was based on the unique relationship between supervisor and employee, and because applying the Elliott-Larsen Civil Rights Act to torts outside the scope of accommodations or services normally delivered by a governmental agency erodes the intent behind the Governmental Tort Liability Act. If extended, strict liability should be imposed only where the foundations of the *Champion* holding have been met.

A. Standard of Review

Questions of statutory construction are reviewed *de novo*.[62]

B. Analysis

The ELCRA prohibits discrimination on the basis of sex, which is defined to include sexual harassment.[63] The ELCRA defines sexual harassment as:

> (i) . . . unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> > (*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
> >
> > (*ii*) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.
> >
> > (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, education, or housing environment.[64]

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[62] *Apsey*, 477 Mich at 127.
[63] MCL 37.2103(i).
[64] MCL 37.2103(i).

Sexual harassment that falls within *(i)* or (*ii*) is referred to as quid pro quo harassment, while sexual harassment that falls within (*iii*) is known as hostile environment harassment.[65]

In employment cases, a plaintiff pursuing a claim of quid pro quo harassment under MCL 37.2103(i)(*i*) or (*ii*) must establish (1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the statute [unwelcome sexual advances, requests for sexual favors, or conduct or communication of a sexual nature], and (2) that her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment.[66] Based on the plain language of this definition, a plaintiff claiming quid pro quo harassment in the context of public accommodations or services must show that obtaining public accommodations or public services, or a decision affecting the public accommodations or public services, was conditioned on submission to sexual conduct or communication.

Case law sets forth differing treatment of respondeat superior claims in the two types of sexual harassment cases brought under the ELCRA. This Court has repeatedly declined to impose strict liability on the employer in hostile work environment cases, absent the employer's awareness of the offensive conduct.[67] Yet in *Champion v Nationwide Security, Inc* this Court imposed strict liability on the employer for quid pro quo sexual harassment by a supervisor who "used his supervisory power" to accomplish the harassment.[68]

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[65] *Chambers v Trettco, Inc*, 463 Mich 297, 310; 614 NW2d 910 (2000).
[66] *Champion v Nationwide Security, Inc*, 450 Mich 702, 708; 545 NW2d 596 (1996).
[67] See, e.g., *McClements v Ford Motor Co*, 473 Mich 373; 702 NW2d 166 (2005), amended 474 Mich 1201; 704 NW2d 68 (2005).
[68] *Champion*, 450 Mich at 712-713.

1. This Court should overrule *Champion v Nationwide Security* because it is contrary to well-established agency principles, is not supported by the plain language of the ELCRA, and fails to accomplish the remedial goals of the Act.

This Court's rationale for the distinction in treatment between hostile work environment cases and quid pro quo sexual harassment cases is that in a hostile work environment case "the supervisor acts outside 'the scope of actual or apparent authority to hire, fire, discipline, or promote,'"[69] whereas "the quid pro quo harasser, by definition, uses the power of the employer to alter the terms and conditions of employment."[70] This distinction is inherently problematic, however, because in many quid pro quo sexual harassment cases—as in some hostile work environment cases—the employer cannot have foreseen the harassment. The employer who cannot foresee that a supervisor might use his managerial authority to sexually harass an employee cannot prevent the misuse of that managerial authority. *Champion's* strict liability standard leaves no room for an inquiry into whether the employer could have delegated supervisory authority in a manner that prevented or minimized the potential for the supervisor to unlawfully use that authority while acting outside the scope of employment.[71] Under such circumstances, it cannot be fairly said that the employer committed the violation.[72]

Moreover, *Champion* was based on the rationale that quid pro quo harassers use their supervisory powers to sexually harass subordinates. There may indeed be circumstances where supervisors use their supervisory powers to sexually harass. In those circumstances courts should, as they do in hostile work environment cases, determine the extent of employer liability

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[69] *Chambers*, 463 Mich at 311 (citing *Radke v Everett*, 442 Mich 368; 501 NW2d 155 (1993)).
[70] *Chambers*, 463 Mich at 311.
[71] See *Zsigo v Hurley Med Ctr*, 475 Mich 215, 232; 716 NW2d 220 (2006)(Young, J., concurring) (noting that it is difficult to reconcile *Champion's* holding with conventional notions of agency).
[72] *Chambers*, 463 Mich at 312 (stating that whether analyzing quid pro quo harassment or hostile environment harassment, the question is always whether it can be fairly said that the employer committed the violation—either directly or through an agent).

only after analyzing the employer's knowledge and actions. But it extends beyond agency principles to say, as this Court did in *Champion*, that a supervisor uses his or her supervisory powers to rape an employee. Although the very nature of a supervisor gives them authority over their subordinates, a criminal activity such as rape is not within the employee's "'scope of actual or apparent authority to hire, fire, discipline, or promote.'"[73]

Thus, *Champion's* strict liability standard does not provide an incentive for employers to attempt to reduce tortious conduct by their employees. One of this Court's concerns in *Champion* was that "[a]llowing employers to hide behind a veil of individual employee action will do little, if anything, to eradicate discrimination in the workplace."[74] But an employer who cannot have foreseen a supervisor's quid pro quo sexual harassment is not hiding behind a veil of individual employee action. Nor will holding that employer strictly liable for such harassment do anything to minimize or prevent the next instance of quid pro quo harassment by supervisory personnel where the employer's only hand in creating or adding to the abuse was to give the supervisor the authority that is both inherent and necessary in a supervisory role. [75]

The purpose behind broadly construing remedial statutes such as the ELCRA is "to suppress the evil and advance the remedy."[76] This was clearly the rationale behind *Champion*. Indeed, the *Champion* Court explained that the strict liability rule it fashioned "is fully consistent . . . with the legislative intent that employers, not the victims of sexual harassment, bear the costs of *remedying and eradicating* discrimination."[77] Yet, *Champion's* strict liability rule has not advanced – and cannot advance – a remedy or eradicate quid pro quo sexual harassment.

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[73] *Chambers*, 463 Mich at 311 (quoting *Radke*, 442 Mich at 368).
[74] *Champion*, 450 Mich at 713 (citing *Henson v City of Dundee*, 682 F2d 897, 909 (CA 11, 1982)).
[75] *Champion*, 450 Mich at 713 (recognizing that "most employers are corporate entities that cannot function without delegating supervisory power").
[76] *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34; 427 NW2d 488 (1988).
[77] *Champion*, 450 Mich at 714 (emphasis added).

Therefore, the purpose behind broadly construing the ELCRA is seriously eroded. Instead, the rule requires that even the most responsible, proactive employer gaze into a crystal ball and predict when one of its supervisors will misuse or act outside his or her actual or apparent authority.

It is a well-established common law principle that an employer is not strictly, vicariously liable for the intentional criminal acts of an employee where the employer could not foresee specific propensities of the employee to commit such acts and, therefore, had no opportunity to prevent the harm.[78] Nowhere does the ELCRA expressly indicate[79] that the Legislature intended such a radical change to this principle. Such a radical change imposes burdens upon employers that the Legislature simply did not intend.

Accordingly, *Champion* was wrongly decided and should be overruled. In place of *Champion*'s strict liability rule, a case-by-case factual analysis into whether the employer could have delegated supervisory authority in a manner that prevented or minimized the potential for unlawful conduct will ensure that imputed liability is fair and just, encourage remedial action by employers without insulating them from their responsibility to oversee supervisory staff, and provide victims of quid pro quo sexual harassment with a remedy where appropriate.

This Court generally adheres to the principle of stare decisis.[80] But it has been willing to reexamine precedent where, as here, legitimate questions have been raised about the correctness

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[78] See *Brown v Brown*, 478 Mich 545, 547-48; 739 NW2d 313 (2007); see also *Zsigo*, 475 Mich at 230-31. Absent the strict liability of *Champion*, plaintiffs would not be without a remedy. This Court has held that supervisors may be liable for quid pro quo sexual harassment under the ELCRA. Additionally, employers could be held liable under respondeat superior if their action or inaction enabled a supervisor to commit a tortious act.

[79] See *Atty Gen'l v Abbott*, 121 Mich 540; 80 NW372 (1899)(where there is no express provision of law that governs, the question is defined by the principles of the common law); see also *People v Stoeckl*, 347 Mich 1, 16; 78 NW2d 640 (1956)(common law rules are generally not abandoned by mere implication).

[80] *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000).

of a decision.[81] Upon such reexamination, this Court determines whether the precedent was wrongly decided, and if so, examines the effects of overruling, including the effect on reliance interests and whether overruling would work an undue hardship because of that reliance.[82]

Again, *Champion* was wrongly decided because its strict liability rule is contrary to agency principles, is not supported by the plain language of the ELCRA, and does not accomplish the remedial goals of the ELCRA. As to any reliance interest, *Champion* has not become so embedded and accepted that supplanting its harsh strict liability rule with the same case-by-case analysis already utilized by courts in hostile work environment cases would cause practical problems. Nor would the overruling of *Champion* leave victims of quid pro quo sexual harassment without a remedy. Supervisors may still be liable for quid pro quo sexual harassment under the ELCRA, and employers may be held liable as well if factual circumstances support such imputation of liability. Accordingly, Defendants ask this Court to overrule its decision in *Champion*.

2. If not overruled, *Champion* should not be extended to the public accommodation and public service contexts because it holding and rationale were based on the unique relationship between supervisor and employee.

Even if this Court decides that *Champion* is still good law, its holding articulates a very limited exception to the general rule. First, *Champion* applies only in the context of quid pro quo sexual harassment under MCL 37.2103(i).[83] Second, the decision does not articulate a limitless exception that applies anytime a supervisor allegedly engages in quid pro quo harassment.[84] The supervisor must accomplish the quid pro quo sexual harassment through the use of his

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[81] See *Robinson*, 462 Mich at 464.
[82] *Robinson*, 462 Mich at 466.
[83] *Zsigo*, 475 Mich at 224 ("[T]he *Champion* holding was carefully crafted to apply only in the context of quid pro quo sexual harassment under MCL 37.2103(i)).
[84] *Champion*, 450 Mich at 713.

supervisory managerial powers.[85] Third, as articulated in *Zsigo v Hurley Medical Center*, *Champion* did not adopt an "aided by the agency" relationship exception to respondeat superior.[86] Fourth, as this Court recognized in *Zsigo*, agency reference in *Champion* was made "only in passing and on the basis of the *very distinct facts* of that civil rights matter."[87]

The very distinct facts of *Champion* involved a supervisor/employee relationship whereby the supervisor's scheduling decisions allowed him to work alone with the plaintiff and order plaintiff into a remote part of the building.[88] It was the nature of the supervisor/employee relationship that gave him this "magnitude of authority" and, as this Court characterized this authority, allowed him to use it to rape the plaintiff.

Champion should not be extended to impose strict liability on the employer in quid pro quo sexual harassment claims involving public accommodations and public services because employment relationships are clearer than relationships in the public accommodation/service contexts. It is generally understood by the employer, the supervisor, and the employee that the supervisor has authority over the subordinate employee; that the subordinate employee reports to the supervisor, follows the instructions of the supervisor, and may be subject to job-related repercussions for not following the instructions or requests of a supervisor; and, that the employee is dependent on the supervisor because the supervisor has the power to affect the terms and conditions of employment. Similarly, it is clear that the employer has given a supervisor certain authority over a certain employee, and therefore, the power to use that authority to affect the terms and conditions of the employee's employment. Finally, in employment cases it is clear that the benefits that are offered or threatened are in some way tied directly to the employment.

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[85] *Zsigo*, 475 Mich at 224.
[86] *Zsigo*, 475 Mich at 227.
[87] *Zsigo*, 475 Mich at 223-224 (emphasis added).
[88] *Champion*, 450 Mich at 712.

Quid pro quo harassment cases in the employment context reflect these basic understandings. For this reason, most quid pro quo cases occur in the context of employment,[89] and, as this Court noted in *Champion*, the quid pro quo harasser is usually a supervisor.[90]

But relationships in the public accommodation/service contexts are different. The employer typically has not set up a situation where the seeker of accommodations or services is subordinate to one particular provider or where a particular provider has the power to withhold or prevent the utilization of those benefits. The provider typically does not dictate the accommodation/service seeker's duties, actions, or location. Nor is it typically understood by the seeker that he or she must comply with a particular provider or face a denial of services or accommodations. Further, unlike the exclusivity of the supervisor-employee relationship, the provider of accommodations or services is not generally the only "go to" individual on whom the seeker depends or from whom she can seek recourse. Moreover, the type and scope of authority that an employer gives an accommodation or service provider over a particular seeker of accommodations or services is often less clear than the authority granted to a supervisor in the employment context.

Accordingly, *Champion* should not be extended from the employment setting. Such an extension will have a substantial and negative impact on the body of law being developed in sex discrimination claims in the public accommodation/service contexts.

Significantly, too, the extension of *Champion* will likely impact not just quid pro quo public accommodation and public service cases but also hostile work environment cases in the employment, public accommodation and public service areas, and imposition of employer liability in employment cases in general. Even before to the Court of Appeals' decision in

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[89] *Diamond v Witherspoon*, 265 Mich App 673; 696 NW2d 770 (2005).
[90] *Champion*, 450 Mich at 713.

Hamed, plaintiffs who file sex discrimination claims in the employment context have often attempted to characterize what are essentially hostile work environment claims as quid pro quo claims. In other words, they "stretch" to find some quid pro quo between themselves and the employer in order to benefit from *Champion's* strict liability and escape the obligations this Court has generally imposed on plaintiffs before holding an employer liable. Extension of *Champion* invites plaintiffs to extend this pattern to their sex discrimination claims in the public accommodation/service contexts. And *any* expansion of employer liability with minimal or no obligations on plaintiffs, represents another significant departure from the factors this Court has traditionally expected before holding an employer liable. Such expansion would create particular problems for government employers, who, as this Court has often recognized, *must* provide jobs, services and accommodations that private employers are not required to provide, and thus, cannot escape the imposition of strict liability.[91]

3. Extension of *Champion* to the public service/accommodation contexts would erode the intent of the Governmental Tort Liability Act.

As this Court has recognized, most employers are corporate entities, while entities that deliver public services are governmental entities. [92] This is a significant distinction that bears consideration before the extension of *Champion* to the accommodation/service contexts.

ELCRA claims are essentially tort claims. The Michigan Court of Appeals has stated that "a civil suit for damages based on the alleged violation of a plaintiff's civil rights is in the nature of a tort action."[93] Additionally, ELCRA claims are torts under the United States Supreme Court's analysis in *United States v Burke* because the ELCRA provides the full range of

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[91] See *Ross v Consumers Power Co* (On Rehearing), 420 Mich 567, 618; 363 NW2d 641 (1984) (recognizing the "clear legislative judgment" that public and private tortfeasors be treated differently).

[92] *Champion*, 450 Mich at 713.

[93] *Stimson v Michigan Bell Tel Co*, 77 Mich App 361; 258 NW2d 227 (1977).

torts damages.[94] Therefore, the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*, should be considered by this Court in interpreting the scope of section 103 of the ELCRA. Moreover, the ELCRA and the GTLA relate to the same general subject, and therefore should be read *in pari materia.*[95]

Under the GTLA, a governmental agency remains immune from liability for torts unless an exception to immunity exists.[96] This Court in *Ross v Consumers Power Company* held that the Legislature's grant of immunity is broad and the exceptions are to be narrowly construed.[97] Under MCL 691.1407(1), a governmental agency is immune from tort liability if the agency is engaged in the exercise or discharge of a governmental function. This Court has recognized that a particular statutory intention that is incompatible with a general one shall be considered an exception to the general one.[98] Here there is no clear statutory intention that strict liability be imposed on a governmental agency for the criminal conduct of an employee. Nor is there a clear statutory intention that the ELCRA be applied to torts outside the scope of normally-delivered public services or accommodations. Conversely, the intent of the GTLA is that exceptions be narrowly construed.

The extension of *Champion* would essentially require an interpretation of the terms "public accommodation" or "public service" that encompasses the very performance of a public

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[94] *United States v Burke*, 504 US 229, 235-37; 112 S Ct 1867; 119 L Ed 2d 34 (1992)(following 1991 amendments to Title VII, Title VII claims are considered tort claims for tax purposes because they allow the full range of remedies).

[95] The Michigan Court of Appeals has stated that "[a] civil suit for damages based upon an alleged violation of the plaintiff's right to employment without sex discrimination is in the nature of a tort action. . . ." *McCalla v Ellis*, 129 Mich App 452, 462; 341 NW2d 525 (1983) (citing *Stimson v Michigan Bell Tel Co*, 77 Mich App 361; 258 NW2d 227 (1977)).

[96] MCL 691.1407(1).

[97] *Ross*, 420 Mich at 591, 620.

[98] *Attorney General ex rel Owen v Joyce*, 233 Mich 619, 624; 207 NW 863 (1926); *Reed v Secretary of State*, 327 Mich 108; 41 NW2d 491 (1950).

service employee's job, no matter how tortiously performed.[99] The ELCRA should not be expanded to include any tort committed by a public accommodation or public service entity or its agent, especially when that tort is unrelated to the services, privileges, or advantages commonly offered by the public accommodation or public service entity. Such an expansion would allow plaintiffs who choose to sue governmental agencies for quid pro quo sexual harassment to radically expand recovery for "torts" otherwise expressly barred by the GTLA. Plaintiffs ought not be able to avoid the doctrine of governmental immunity simply by manufacturing a civil rights action out of a tort claim. This would severely impact governmental operations and actions by subjecting governmental entities to almost limitless liability for quid pro quo sexual harassment. Accordingly, *Champion* should not be extended to hold governmental agencies strictly liable for the quid pro quo sexual harassment of its employees in the public accommodations and public service contexts.

4. If this Court extends *Champion* to the public accommodations and public services contexts, courts should require the same narrow parameters that were the foundation of the *Champion* holding.

If the *Champion* rationale is extended beyond its employment setting to the public accommodation/service contexts, as the Court of Appeals did in *Hamed*, this Court should guide lower courts in establishing the parameters for its application, and in preserving the very narrow basis on which *Champion* was decided.

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[99] As noted above, the ELCRA defines "place of public accommodation" as "a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public." The act defines "public service" as "a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment." MCL 37.2301.

Drawing on the crux of the *Champion* analysis, the Court of Appeals in *Hamed* explained that an offender must not merely seize an opportunity provided by his employment, but rather, must use his managerial authority over the subordinate as the instrumental and integral tool in perpetrating the sexual exploitation.[100] While this distinction is helpful, it is not specific enough to guide the bench or bar in determining what a plaintiff must show to prevail in a quid pro quo sexual harassment case in the public service or public accommodations context. Given the troubling impact of imposing strict liability on governmental agencies, this Court should make clear that the fundamental basis of the *Champion* decision must be present in the accommodation/service contexts before holding the employer strictly liable for quid pro quo sexual harassment.

a. The alleged harassment must deny the plaintiff public accommodations or public services authorized by law.

A tangible employment decision is the "sine qua non of a quid pro quo harassment claim."[101] Likewise, in the public accommodations/service contexts it is not enough that the alleged quid pro quo sexual harassment affects the plaintiff. Rather, the harassment must also condition the receipt of benefits on submission to sexual conduct or communication. This requirement is tantamount to a tangible employment action in the employment context. [102]

The language of MCL 37.2103(i)(*i*) clearly prohibits making sexual conduct or communication a condition of "obtaining" accommodations or services.[103] It is less clear what would constitute a sufficient "factor in decisions affecting the individual's employment, public

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[100] *Hamed v Wayne County*, 284 Mich App 681, 690; 775 NW2d 1 (2009).
[101] *Chambers*, 463 Mich at 317.
[102] *Chambers*, 463 Mich at 324 (explaining that the statute cannot be rewritten to hold employers responsible for any decision occurring at work that affects an individual, but only for decisions affecting the individual's *employment*).
[103] MCL 37.2103(i)(*i*).

accommodations or public services, education, or housing" under MCL 37.2103(i)(*ii*).[104] To the extent the ELCRA is an exception to the broad grant of immunity afforded a governmental agency under the GTLA, that phrase should be narrowly construed to require a showing that the decision affecting the accommodations or services led to a denial of accommodations or services authorized by law. This interpretation is bolstered by the purpose of the ELCRA, which is to prevent discrimination in employment and housing and other real estate, and to ensure full and equal utilization of public accommodations, public services, and educational facilities.[105] As the Court of Appeals stated in *Safie Enterprises, Inc v Nationwide Mutual Fire Insurance Co*, even though certain ELCRA language appears to be broad, "the intention behind the act was to insure equal access to places of accommodation and service."[106]

Therefore, the ELCRA does not protect individuals who were subject to quid pro quo harassment by the promise or threat of services or accommodations to which they were *not* entitled by law. In other words, the use of sexual conduct or communication as a bargaining chip does not, by itself, bring a case into the ambit of the ELCRA.

Nor does the ELCRA protect individuals who were victims of the criminal conduct of a public accommodations or public service entity employee but were not denied access to or utilization of the recognized services, privileges, and advantages of the public service entity or accommodation. The Court of Appeals in *Dockweiler v Wentzell* recognized this when it held that the plaintiff who was sexually abused by a staff psychologist and employee of Allegan County Mental Health Services did not have a valid claim for denial of the full and equal enjoyment of services under MCL 37.2302(a) of the ELCRA because she was not denied the

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[104] MCL 37.2103(i)(*ii*).
[105] MCL 37.2101 (1).
[106] *Safie Enterprises, Inc v Nationwide Mutual Fire Insurance Co*, 146 Mich App 483, 495; 381 NW2d 747 (1985).

public services based on her sex.[107] The Court of Appeals noted that the plaintiff was not only given access to services at the mental health clinic, but also "given the full opportunity to use the services provided to the public" for a period extending over eleven or twelve months.[108]

Although the Court of Appeals in *Hamed* took great pains to explain how Johnson, as the sole deputy in charge of the jail, used his physical and legal authority over Hamed to exploit her sexually,[109] that Court did not adequately explain whether and how this led to a denial or substantial interference with the public services or accommodations to which plaintiff may have been entitled. Johnson may indeed have been the only one with "authority to decide when [plaintiff] would be referred to the female area of the prison" and he may have been able to "use his authority to decide which cell plaintiff would be placed in, and to direct her around the jail."[110] But it is not clear whether Hamed had a right to a comfortable, as opposed to an uncomfortable, cell and whether she had a right to be transferred to the female area of the jail within a certain time period. Therefore, it is not clear that Johnson's use of his "managerial authority"—even if it was sufficiently similar to a supervisor's authority—led to a denial or interference with the utilization of any services or accommodations to which *Hamed* was entitled by law.

b. The offender must use a supervisory-like authority to accomplish the quid pro quo harassment.

Using *Champion* as a guide, the Court of Appeals in *Hamed* explained that to hold an employer strictly liable the quid pro quo sexual harasser must have the authority, not just the

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[107] *Dockweiler v Wentzell*, 169 Mich App 368, 374; 425 NW2d 468 (1988).
[108] *Dockweiler*, 169 Mich at 374.
[109] *Hamed*, 284 Mich App at 691.
[110] *Hamed*, 284 Mich App at 691.

opportunity, to give or withhold the sought-after services or accommodations.[111] *Hamed* distinguished *Zsigo* from *Champion* because the nurse assistant in *Zsigo* had the mere opportunity without the authority described in *Champion*.[112] But the distinction between authority and opportunity does not sufficiently instruct as to what type or scope of authority will suffice to hold the employer strictly liable. *Champion* was not based on mere "authority" but on "supervisory authority."[113]

Champion held that quid pro quo harassment occurs "*only* where an individual *is in a position to offer tangible job benefits* in exchange for sexual favors, or alternatively, threaten job injury for a failure to submit."[114] In the employment context, it is understood that the supervisor is the direct "go to" person for the employee being supervised; that the employee must follow the supervisor's directives; and, that the supervisor can provide or withhold employment benefits or otherwise affect the victim's terms and conditions of employment. Often, there is no one other than the supervisor from whom the employee can seek recourse. For this reason, *Champion* recognized that the party engaged in quid pro quo harassment is almost always a supervisor.[115]

Thus, the distinction between mere authority and "supervisory authority" is an important limitation on the *Champion* holding, and one that should be preserved. If *Champion* is to be extended, the quid pro quo harasser in the public accommodation/service contexts must have supervisory-like powers—not just any degree of authority. In other words, the person conditioning the service or accommodation on sexual favors must be the person who exclusively holds the power to deliver to or withhold those services or accommodations from the plaintiff.

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[111] *Hamed*, 284 Mich App at 691; see also *Champion*, 450 Mich at 713; *Chambers*, 463 Mich at 920.
[112] *Hamed*, 284 Mich App at 690.
[113] *Champion*, 450 Mich at 712 (adopting the nearly unanimous view that imposes strict liability on employers for quid pro quo sexual harassment committed *by supervisory personnel*).
[114] *Champion*, 450 Mich at 713 (emphasis added).
[115] *Champion*, 450 Mich at 713.

Additionally, the employer must be the source of the specific power that permitted the denial of benefits. As this Court noted in *Champion*:

> [W]hen an employer gives its supervisors *certain* authority over other employees, it must also accept responsibility to remedy the harm caused by the supervisors' unlawful exercise of *that* authority.[116]

Moreover, based on *Zsigo*, apparent supervisory authority is insufficient to impose strict liability on the employer whose supervisory employee engages in quid pro quo sexual harassment. In *Zsigo*, the nurse assistant who acted outside the scope of his employment by sexually assaulting a patient in the emergency room, clearly lacked the supervisory or managerial authority. The patient, however, believed he had authority, as she testified that she "'suddenly thought he was a very powerful person in the hospital" and "would release [her].'"[117] Yet this Court did not impose respondeat superior liability on the employer.[118]

c. The victim must have no other viable recourse to obtain accommodations or services authorized by law.

The plaintiff must be placed in a vulnerable position that leads to conditions being placed on services or accommodations, with no other viable recourse. Vulnerability was a key component in *Champion*. As a direct result of her supervisor's power over her, the plaintiff was working alone with him, ordered into a remote part of the building, raped, and constructively discharged.[119] Those circumstances, together with a basic understanding of the relationship between supervisor and employee, suggest that the plaintiff had no other recourse.[120]

The dissenting opinion in *Chambers* discusses this concept. In that case the defendant employer gave the offending employee supervisory authority over the plaintiff. The offender

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[116] *Champion*, 450 Mich at 712 (emphasis added).
[117] *Zsigo*, 475 Mich at 218 (quoting the statement of facts from the Court of Appeals).
[118] *Zsigo*, 475 Mich at 231.
[119] *Champion*, 450 Mich at 712.
[120] *Champion*, 450 Mich at 712.

used that authority to proposition and eventually assault the plaintiff. The dissent notes: "Had Mr. Wolshon not been the supervisor, he would not have been able to continue this pattern of behavior. Someone having authority over him would have stopped it after the first instance."[121] As the dissent further pointed out, "[t]here was no one in a higher position at the location where Mrs. Chambers worked who was authorized to curb Mr. Wolshon's conduct."[122] Similarly, in *Dockweiler*, the defendant facility whose psychiatrist staff employee sexually exploited a counseling patient argued that if the plaintiff questioned the propriety of the therapy, she only had to "walk away," request a new counselor, or complain to a higher authority.[123] The Court of Appeals determined that plaintiff's ELCRA claim against the mental health facility failed to state a claim.[124]

Applying the implicit rationale in *Champion*, the plaintiff seeking to hold the employer strictly liable for quid pro quo harassment in the public accommodation/service contexts must not have reasonably been able to obtain accommodations or services from another employee.

d. There must be a causal relationship between the quid pro quo harassment and the denial of tangible public accommodations or public services.

An essential component of the *Champion* holding was that the requisite "decision affecting . . . . employment" was taken in response to the plaintiff's refusal to voluntarily submit to her supervisor's sexual requests.[125] Therefore, a plaintiff who seeks to hold the employer vicariously liable for quid pro quo harassment in the public accommodation/service contexts

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[121] *Chambers*, 463 Mich at 333 (Kelly, J., dissenting).
[122] *Chambers* 463 Mich at 332.
[123] *Dockweiler*, 169 Mich App at 374.
[124] *Dockweiler*, 169 Mich App at 373.
[125] *Champion*, 450 Mich at 711.

must demonstrate that denial of accommodations or services was a consequence of the plaintiff's rejection of, or submission to, the employee's harassment.[126]

Without these parameters, strict liability in the public accommodations/service contexts is a slippery slope that could easily lead to "a threat of vicarious liability that knows no borders," and erosion of the doctrine of respondeat superior.[127] When this Court in *Zsigo* declined to adopt an agency exception, it both expressed concern over an exception to vicarious liability that can be applied too broadly and underscored the importance of the supervisory-employee relationship:

> Given the danger of applying such a broad exception to respondeat superior employer nonliability because employers may be subject to strict liability, courts that have applied the exception have done so primarily in sexual harassment/discrimination case on the basis that an employer is vicariously liable when a supervisory employee uses his agency position to sexually harass an employee.[128]

Additionally, this Court highlighted the importance of context when it explained why it rejected *Faragher v Boca Raton* as the basis for recognizing an agency exception to vicarious liability:

> [*Doe v Forrest*] cited *Faragher v Boca Raton* as the basis for extending § 219(2)(d) beyond the realm of sexual harassment in the employment setting. According to the dissent, there are three balancing factors from *Faragher* that courts can consider when applying § 219(2)(d) [internal citation omitted]. However, the dissent ignores *the* very specific context in which those factors were applied, namely *to a supervisor-employee relationship*. The actual language from *Faragher* is not broadly worded, but is in fact precisely tailored to the unique circumstances of a sexual harassment suit in an employment context.[129]

Consistent with this Court's cautionary statements, *Champion* should not be extended beyond its very specific context: quid pro quo sexual harassment of a subordinate by a supervisor in the employment context. If it is to be extended, this Court should provide guidance

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[126] See *Chambers*, 463 Mich at 322.
[127] *Zsigo*, 475 Mich at 230 (internal citation omitted).
[128] *Zsigo*, 475 Mich at 227.
[129] *Zsigo*, 475 Mich at 229 (emphasis in original).

to the bench and bar as to how to apply *Champion*'s narrow rationale to the public accommodation and public service contexts.

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth above, Amicus Curiae Attorney General Bill Schuette respectfully requests that this Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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